

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFF RISHER

Claimant

V.

EATON CORPORATION

Respondent

AND

EATON CORPORATION

Insurance Carrier

Docket No. 192,945

ORDER

Claimant requests review of Administrative Law Judge Thomas Klein's October 18, 2013 Order. This is a post-award proceeding. The case has been placed on the summary docket for disposition without oral argument. Claimant appeared pro se. P. Kelly Donley and Dallas L. Rakestraw, both of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The appeal record is the same as that considered by Judge Klein and consists of the transcript of the October 10, 2013 post award medical scheduled as a preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant filed an application for post award medical, termination or modification of medical benefits on July 31, 2013 stating:

[M]y case was mishandled by Thomas Lietz[.] [H]e never asked for my lost wages totalling \$136,000 dollars and mentioned nothing about my pain and suffering! I was diagnosed with [chondrosarcoma] (cancer) as a result of chemicals used during my employment at Eaton Corp!

At the hearing, claimant confirmed he was seeking lost wages, damages for pain and suffering and perhaps medical treatment for cancer due to asserted chemical exposure. The one-page Order stated:

Claimant's request for modification is denied for failing to substantiate or articulate any legal basis for the requested benefits. Claimant is encouraged to obtain legal counsel for any further proceedings.

Claimant requests the Order be reversed. He argues entitlement to lost wages, medical compensation and ongoing medical treatment.

Respondent requests the appeal be dismissed and argues the Board lacks jurisdiction because the post-award hearing was held as a preliminary hearing and claimant raised no appealable issues from a preliminary hearing. If the Board concludes it has jurisdiction, respondent requests the Order be affirmed and argues claimant failed to establish a causal connection between his current condition and the work-related injury.

The issues for the Board's review are:

1. Does the Board have jurisdiction to consider claimant's appeal based on whether the post-award proceeding was held as a preliminary hearing?
2. Can the Board grant claimant's request for benefits?
3. Should the Board disregard references and arguments made by claimant to records that are not part of the appellate record?

FINDINGS OF FACT

Claimant was injured on or about July 13, 1994, when he lifted a heavy tub and felt a pop or pull in his back. Following his release from medical treatment, claimant was able to return to work for respondent earning comparable wages. On October 3, 1995, the parties entered into a settlement agreement wherein claimant received \$9,266.95 in permanent partial disability benefits representing a 7% whole body functional impairment. Claimant's future medical benefits were left open.

Sometime in 1996, claimant was involved in a motor vehicle accident that aggravated his prior back injury. Such injury was outside the realm of workers compensation. He treated with injections, physical therapy and surgery. He had a functional capacity evaluation. He hired counsel, who referred him to Jerry D. Hardin for an evaluation regarding claimant's ability to work and earn wages in the open labor market. Claimant settled any claims stemming from his motor vehicle accident for around \$21,000.

While undergoing treatment for the motor vehicle accident, claimant was diagnosed with chondrosarcoma in his left hip. He underwent four surgeries to remove the cancer and repair his hip. Unfortunately, he developed an altered gait which requires him to use a cane. Claimant contends the cancer resulted from chemical exposure while employed by respondent in 1997 or 1998 and that he knew at such time that his cancer might have been related to exposure to chemicals at Eaton. Claimant testified he did not know how to "apply to the director for Eaton Corporation to get medical or medical coverage" ¹ Claimant's evidence regarding occupational exposure leading to cancer, and what he did thereafter, is as follows:

¹ P.A.H. Trans. at 24.

- A. . . . When I was first interviewed by Kimberly J. Templeton, my surgeon, she asked me have I ever worked around chemicals. And I told her yes and she asked me where, and I told her that it was at Eaton Corporation.
- Q. Did you ever file a work comp claim against Eaton Corporation for your hip problems?
- A. No.
- Q. Did you ever file a work comp claim against Eaton Corporation as a result of the alleged cancer that you thought you might have had from the chemicals?
- A. No, I wasn't sure how to go about doing that. And when we were in court the first settlement with Tom Lietz I was left in the dark completely about how to go forward with any kind of medical - - submitting anything or trying to get medical treatment by going to the director what I was told, the director of - - I forgot how that they put that. The director of - - upon proper application to the director.²

Claimant's testimony focused on 18 years of daily suffering, lost wages, pain and suffering, dissatisfaction with his prior workers compensation attorney, Mr. Lietz,³ unpaid medical bills, and out-of-pocket prescription drug expenses. He stated, "I want justice served here. I just want what is due and owing to me."⁴

PRINCIPLES OF LAW

Workers compensation laws in effect at the time of an accident govern the claim.⁵

Claimant has the burden to prove entitlement to benefits by a preponderance of the credible evidence.⁶

² *Id.* at 20-21.

³ Claimant testified Mr. Lietz "threw me under the bus." *Id.* at 8. Mr. Lietz was disbarred in 2003. *In re Lietz*, 277 Kan. 26, 81 P.3d 1243 (2003). Claimant also had vague complaints about attorney David F. Holmes, who had some involvement in his motor vehicle accident claim. Mr. Holmes was disbarred in 2011. *In re Holmes*, 293 Kan. 478, 264 P.3d 423 (2011).

⁴ *Id.* at 11.

⁵ K.S.A. 44-505(c) (Furse 1993).

⁶ K.S.A. 44-501(a) (Furse 1993) and K.S.A. 44-508(g) (Furse 1993).

At the time of claimant's 1994 accidental injury, the methods to obtain post-award medical were by way of a preliminary hearing or a review and modification hearing. A review and modification hearing is designed to alter the original award. In 2000, after claimant settled his case, the legislature enacted K.S.A. 44-510k, which allows a judge to award further medical care that is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.

K.S.A. 44-534a(a)(2) (Furse 1993) states in part:

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 44-555b(a) (Furse 1993) states in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS

1. The Board has jurisdiction to consider claimant's appeal.

Respondent argues the Board lacks jurisdiction from a preliminary hearing. We disagree.

The transcript of the hearing identifies it as "Post Award Medical Scheduled as a Preliminary Hearing." Judge Klein indicated the hearing was a "prelim inside a post-award medical case" and it was a "prelim."⁷ However, claimant filed an application for a post-award medical (E-4). On August 5, 2013, the Division of Workers Compensation issued a Notice of Hearing/Application for Post Award Medical. At no point did claimant serve respondent with a benefit-specific seven-day demand as a prelude to scheduling a preliminary hearing or file an application for a preliminary hearing (E-3). While the judge characterized the hearing as a preliminary hearing, absent claimant jumping through the procedural hoops contained in K.S.A. 44-534a (Furse 1993), a preliminary hearing cannot be held. The hearing is best labeled a post-award hearing for medical treatment, despite claimant wanting much more than medical benefits. While claimant was seeking a mishmash of benefits, doing so was not on a preliminary hearing basis. This conclusion disposes of respondent's argument that the Board lacks jurisdiction based on claimant failing to raise an issue appealable from a preliminary hearing.

⁷ *Id.* at 4-5.

2. The Board cannot award claimant the benefits he seeks.

We agree with Judge Klein that it is difficult to ascertain what benefits claimant is seeking. Claimant's main complaints at the hearing concerned lost wages, pain and suffering, cancer due to occupational exposure, unpaid medical bills and out-of-pocket prescription costs, and how his prior workers compensation attorney did a bad job.

Claimant also contends a judge erred in finding: (1) he was released from treatment and did not need additional medical treatment; and (2) such judge should have considered certain social security records. Claimant's argument is confusing. Claimant may be referring to errors allegedly made by Special Administrative Law Judge Thomas Toepfer, who presided over the settlement hearing in 1995. He states on page one of his written argument that "the judge concluded" that he "achieved maximum medical improvement and the impairment(s) to be permanent and stabilized!" Exclamation mark aside, the finding of maximum medical improvement and permanent and stable impairment was made by Dr. Bieri on June 2, 1995, not by a judge. Claimant also alleges, on page three of his argument, that a judge concluded he was "released from all active medical care, and no future specific treatment is anticipated. This appears reasonable, appropriate and consistent." Dr. Bieri, not a judge, made such statement. Dr. Bieri's report was attached to the settlement hearing transcript.

Respondent cries foul based on claimant referencing medical records and social security records not in evidence. We will attempt to address these concerns.

A. *Lost Wages/Pain and Suffering*

The Board cannot award lost wages or damages based on pain and suffering. The Board can only award monetary benefits as spelled out in the Kansas Workers Compensation Act: death benefits, permanent total disability benefits, permanent partial disability benefits, temporary total disability benefits and temporary partial disability benefits. Even if the Board could construe claimant's request for indemnity benefits, claimant likely does not have a temporary disability, permanent partial disability benefits cannot be awarded more than 415 weeks after the date of injury⁸ and there is no evidence claimant is permanently and totally disabled on account of his injury. Moreover, claimant did not set forth proof that his disability is due to his 1994 accidental injury. Claimant may consult with an attorney to determine if any claim that his disability is due to job-related chemical exposure may be time-barred.

⁸ See K.S.A. 44-510e.

B. Cancer Due to Alleged Occupational Exposure

Claimant's conjecture that exposure to chemicals at work in the 1990s caused his cancer is insufficient to sustain his theory. Medical evidence is not always necessary, but no medical evidence was presented to Judge Klein and the Board will not presume claimant's lay testimony on this complex medical issue is sufficient evidence on causation.

Moreover, claimant faces two large hurdles. First, even if the Board were to construe claimant's efforts as akin to a review and modification proceeding, the general goal would be to modify the underlying award. Here, claimant is not really trying to modify the original award – which concerned a low back injury from lifting – but is asserting a wholly new injury, i.e., cancer from asserted chemical exposure. Claimant testified he never filed a claim for occupational related cancer. Second, there is no evidence claimant currently needs treatment due to cancer, so the issue is not ripe for adjudication.

C. Unpaid Medical Benefits/Out-of-Pocket Expenses

There are no medical bills in evidence for the Board to consider. No bills were ever presented to Judge Klein.

D. Dissatisfaction with Prior Attorney

The Board does not have jurisdiction over a claimant's complaints about an attorney, including attorney malpractice or ethics issues.

E. Judge's Consideration of Evidence

Claimant asserts a judge should have read certain social security records. Whether claimant is referring to Judge Klein or SALJ Toepfer is unknown. Setting aside the issue of whether claimant may assert error with SALJ Toepfer's ruling in excess of ten days thereafter, and instead complains about the ruling more than 18 years after the fact, the social security record claimant expected the judge to read was apparently generated after 1996. SALJ Toepfer cannot be faulted for not reading an unavailable record.

Claimant never placed any social security records in evidence, so neither judge can be faulted for not considering records not provided for their perusal. The Kansas Department of Labor, Division of Workers Compensation, Judge Klein and SALJ Toepfer, did not have independent access to the social security records referenced by claimant.

Respondent argues claimant should not be allowed to reference medical records and social security records that are not in evidence. Respondent is correct. The Board can only consider evidence presented in the first instance to the judge.⁹ In any event, the aforementioned records have no impact on our decision.

⁹ K.S.A. 44-555b(a) (Furse 1993).

CONCLUSIONS

For the aforementioned reasons, the Board cannot award claimant the benefits he is seeking.

DECISION

WHEREFORE, the Board affirms the October 18, 2013 Order.¹⁰

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Thomas Klein

¹⁰ As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal. Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.